



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MKB/145423

PRELIMINARY RECITALS

Pursuant to a petition filed November 20, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on January 17, 2013, at Racine, Wisconsin.

The issue for determination is whether the Department of Health Services' Children's Long Term Support Programs correctly discontinued Petitioner's eligibility for Katie Beckett by determining that she no longer meets the institutional level of care eligibility criteria.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Barbara Behrend, RN
Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Racine County.

2. Petitioner has been eligible for Wisconsin Medicaid through the Katie Beckett Program since September 2009. Her eligibility was initially under the Nursing Home Level of Care and subsequently under the Developmental Disabilities Level of Care.
3. Petitioner's Katie Beckett eligibility was subject to review in October 2012. Following that review the Department's Division of Long-term Care concluded that Petitioner was no longer eligible for the Katie Beckett program and sent a letter dated October 25, 2012 that informed Petitioner's family of the discontinuance of those benefits. An appeal was timely filed.
4. Petitioner is three years of age (5/18/09). Petitioner's disabilities are documented at page 2, the last paragraph of Exhibit # 4, Department's response letter to this appeal, dated November 28, 2012. They are also noted at Exhibit # 3, the recertification application for Katie Beckett at line 12.
5. There is no dispute as to the level of care at issue here; it is the intermediate care/developmental disability level of care. Further, it is not disputed that Petitioner has a diagnosis that would qualify her for that level of care.
6. The reason for the denial of continued Katie Beckett eligibility here is that the Department concluded that Petitioner does not have substantial cognitive impairment as defined by the Katie Beckett program nor does she have substantial functional limitations in one or more areas of major life activities. The Department's November 28, 2012 letter explaining its action also suggests that Petitioner does not need active treatment.
7. As of the date of the hearing, Petitioner has not had any cognitive testing that would indicate a 30% or greater delay or a standard score of two or more standard deviations below the mean on standardized or norm-referenced measures of aggregate intellectual functioning or adaptive behavior.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria, to receive MA while living at home with their parents. *§ 49.47(4)(c)1m, Wis. Stats.* The Department of Health Services' (DHS) Division of Long Term Care (DLTC) is required to review "Katie Beckett" waiver applications in a five-step process.

The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made for the Division of Hearings and Appeals Bureau by the Disability Determination Bureau. The Department does not contend that this child is not disabled. After the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. *See 42 C.F.R. §435.225(b)(1).* The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child. It is the level of care that is at issue here.

Again, the purpose of the Children's Long Term Support Programs is to provide individuals with a community alternative to institutionalization. *See Medicaid Waivers Manual Chapter I Overview and Administration Page I-1.* Among a number of eligibility criteria is the requirement that a child meet an institutional level of care. There currently are four levels of care: hospital, nursing home, psychiatric hospital, and intermediate care facility for the developmentally disabled (ICF-DD).

The DHS has developed policy, found at *Appendix A-10 to Bureau of Long-Term Support Medicaid Home & Community-Based Waivers Manual*, which defines and describes those childhood care levels and contains the requirements needed to qualify for Child's Long Term Support Programs. This manual was

updated in 2011. (The department's November 28, 2012 letter (Exhibit 4) indicates that the eligibility determination for this particular application was based upon January 2010 criteria. It is not clear why this standard is used as there is a February 2011 update. Regardless, it is the February 2011 standards that are applied here). In brief those are (all emphasis in the original):

- Hospital Level of Care

A child with a Hospital – Physical Disabilities (PD) Level of Care has needs that are typically met in an in-patient medical hospital setting. The child's medical needs must be chronic, persistent and expected to last at least six months from the date of review. The skilled care needs cannot be acute and of a short-term duration. *The frequency and complexity of the required skilled medical interventions must be so substantial that without these direct, continuous skilled medical interventions, the child is at risk of institutionalization within a long-term, in-patient medical hospital.*

- Psychiatric Hospital Level of Care

The child with a Psychiatric Hospital - Severe Emotional Disturbance (SED) Level of Care has a long-term, severe mental health condition diagnosed by a licensed psychologist or psychiatrist. In addition, this child demonstrates persistent behaviors that create a danger to self or others, requiring ongoing therapeutic support in order to be able to live at home and in the community. *The intensity and frequency of the required ongoing therapeutic support must be so substantial that without the support the child is at risk of inpatient psychiatric hospitalization.*

A child may be assigned this level of care if the child meets **ALL FOUR of the criteria listed below** for Severe Emotional Disturbance. The criteria are:

1. The child has a **Diagnosis** of a mental health condition; and
2. The child's mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific **Duration** of time; and
3. The child is in need of **Involvement with Service Systems** related to mental health support; and
4. The child exhibits **Severe Symptomology or Dangerous Behaviors** at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

- Intermediate Care Facility for Developmental Disabilities (ICF-DD or ICF-MR)

A child with an ICF/MR - Developmental Disability (DD) Level of Care has a permanent cognitive disability, substantial functional limitations and a need for active treatment. The level of care criteria is based upon the child having needs similar to people in an intermediate care facility for children with mental retardation (ICF/MR). *The intensity and frequency of required interventions to meet the child's functional limitations must be so substantial that without the intervention, the child is at risk for institutionalization within an ICF/MR.*

A child may be assigned this level of care if the child meets **ALL THREE of the criteria listed below** for Developmental Disability. The criteria are:

1. The child has a diagnosis of a **Cognitive Disability** that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates **Substantial Functional Limitations** when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the **Need for Active Treatment.**
(emphasis in the original)

- The Nursing Home Level of Care

The child with a Nursing Home - Physical Disabilities (PD) Level of Care has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate

activities of daily living at home and in the community. This child requires an extraordinary degree of daily assistance from others to meet everyday routines and special medical needs. The special medical needs warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. *The intensity and frequency of required skilled nursing interventions must be so substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home.*

Taken from Appendix A-10 to Bureau of Long-Term Support Medicaid Home & Community-Based Waivers Manual

I also note that the agency has the burden of proof in a benefit discontinuance case. *See, e.g., State V. Hanson, 98 Wis. 2nd 80 (Wis. App. 1980).* That burden is the preponderance of the credible evidence. If the agency presents a prima facie case supporting its position the Petitioner may rebut that case.

There is no contention that Petitioner meets either the nursing home, hospital or psychiatric hospital levels of care so it is the ICF-DD level of care that is at issue here.

The ICF/DD level of care requires that a child have a cognitive disability as well as one of the following substantial learning impairments:

B. The diagnosis must have resulted in the child having **substantial learning impairments** as measured by **ONE** of the following:

1. A 30% (25% if the child is under one year of age) or greater delay in aggregate intellectual functioning, based on valid, standardized and norm referenced measures of aggregate intellectual functioning; OR
2. A score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning.

...

Again, taken from Appendix A-10 to Bureau of Long-Term Support Medicaid Home & Community-Based Waivers Manual

In this case, at this time, Petitioner does not have a result from a valid standardized norm-referenced measure of aggregate intellectual functioning that indicates that she meets the scores just noted above. Thus, she does not meet the ICF/DD level of care standard at this time. Per the Manual, if these criteria are not meant there is no need to continue the analysis of whether there is a substantial functional limitation or the need for active treatment. Those criteria are not, therefore, discussed here.

As Petitioner moves on in school and has her IEP developed, testing may be done which establishes cognitive disability necessary for the ICF/DD level of care. A new application may certainly be filed at any time.

CONCLUSIONS OF LAW

That the evidence demonstrates that Petitioner no longer meets the level of care required to continue her Katie Beckett eligibility.

THEREFORE, it is

ORDERED

That this appeal is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

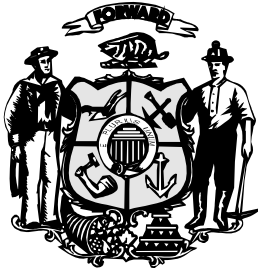
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 18th day of February, 2013

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 18, 2013.

Bureau of Long-Term Support
Division of Health Care Access and Accountability